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No. _____

In the Supreme Court of the United States

October Term, 1985

SPANG & COMPANY,
Petitioner,

v.

SAMUEL GRECCO,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED

1. May an individual prove a pattern or practice of discrimination under the Age Discrimination in Employment Act merely by offering testimony that a selected few of the other persons who were terminated by the same employer over a three and one-half year period were between the ages of 40 and 70, even though there was no evidence that any of those persons lost his job because of his age?

2. Under the Age Discrimination in Employment Act, is it proper to instruct the jury that the defendant must "prove that the discharge was caused by reasons unrelated to plaintiff's age," in light of this Court's decision in *Burdine* that, in Title VII discrimination cases, the burden of proof never shifts to the defendant?

3. May a plaintiff under the Age Discrimination in Employment Act recover "prospective damages in lieu of reinstatement" for a period of over eight years after the trial, despite the fact that, as found by the District Court, he "failed to make reasonable efforts to mitigate damages"?

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

This is an action under the Age Discrimination in Employment Act, 29 U.S.C. §§ 621 *et seq.*, in which the plaintiff, Samuel Grecco, was awarded $637,967.00 by the District Court. The Petitioner, Spang & Company,[1] respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Third Circuit entered on October 15, 1985 affirming the judgment of the District Court.

OPINIONS BELOW

The opinion of the Court of Appeals is not reported. The opinion is reproduced as Appendix A hereto. The opinions and orders of the United States District Court for the Western District of Pennsylvania are not reported and appear as Appendicies B and C hereto.

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals for the Third Circuit was entered on October 15, 1985. This Petition was filed within 90 days of that date. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

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[1]Spang & Company is a privately-held Pennsylvania corporation. It has no parent company, affiliate or subsidiary, except a wholly-owned subsidiary.

STATUTORY PROVISIONS INVOLVED

Section 4(a)(1) of the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 623(a)(1), provides as follows:

> (a) Employer practices
>
> It shall be unlawful for an employer—
>
> (1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age . . . . Amounts owing to a person as a result of a violation of this chapter shall be deemed to be unpaid minimum wages or unpaid overtime compensation for purposes of sections 216 and 217 of this title . . . .

Section 7(b) of the ADEA, 29 U.S.C. § 626(b), provides as follows:

> The provisions of this chapter shall be enforced in accordance with the powers, remedies, and procedures provided in sections 211(b), 216 (except for subsection (a) thereof), and 217 of this title, and subsection (c) of this section.

Section 16(b) of the Fair Labor Standards Act, 29 U.S.C. § 216(b), provides as follows:

> Any employer who violates the provisions of section 206 or section 207 of this title shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages.

STATEMENT OF THE CASE

On October 18, 1978, the chief executive officer of the defendant company (Frank Rath, age 62) fired his chief financial officer (Samuel Grecco, age 53) and immediately replaced Grecco by a promotion from within (Charles Dorsch, age 47). *See* App. E.

Mr. Grecco subsequently filed suit in the United States District Court for the Western District of Pennsylvania, claiming that he was discharged because of his age, in violation of the ADEA. He invoked the jurisdiction conferred on the federal courts by that Act, and demanded and received a jury trial.

Prior to trial and at trial, plaintiff conceded that he had no direct evidence to support his claim that he personally was terminated because of his age. Rather, plaintiff contended that there existed within the company a pattern or practice of age discrimination, and that his discharge was part of that pattern. Plaintiff produced no statistical evidence to show any such pattern or practice. Instead, over defendant's objection, plaintiff relied upon testimony concerning seven selected former employees who were over the age of 40 and who resigned,[2] were terminated[3] or retired[4] over a period of several years.

No evidence was presented that age discrimination was involved in any of these instances. Rather, plaintiff argued that the collective effect of the fact that the employment of

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[2] Bruce Oswalt, age 46, resigned July 1975; Raymond Curry, age 45, resigned September 1978.

[3] Leo Nucera, age 50, terminated September 1975; Dominic Diulus, age 50, terminated July 1977; Melvin Eiben, age 55, terminated December 1978.

[4] Frank Adams, age 58, retired August 1976; William Reffner, age 60, retired March 1977.

seven other persons was terminated permitted the jury to conclude that plaintiff was terminated *because of his age.*

The trial court held that the testimony concerning the seven former employees selected by plaintiff was admissible and was sufficient to prove a pattern, policy or practice of age discrimination.[5]

Following the close of plaintiff's case, defendant presented its case, which consisted of an articulation of the reasons for plaintiff's termination, a detailing of the circumstances under which each of the seven persons left the company, an analysis of the age distribution of its exempt salaried workforce over a ten-year period (Appendix F), and a comprehensive statistical study of the age distribution of all ter-

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[5]At the beginning of the trial, Plaintiff's counsel stated to the trial judge that "[i]f we don't present the testimony of other witnesses, of other employees who were terminated, the heart of our case is eroded." Plaintiff's counsel then described what he intended to prove:

"THE COURT: What do you intend to prove?

"MR. DUFFY: I intend to prove there was a pattern of discrimination based on age. And in doing it, I intend to call several witnesses, all of whom were employed by Spang, or by various divisions of Spang, and all of whom were terminated.

"THE COURT: How many?

"MR. DUFFY: Eight.

"THE COURT: All right, you can do it. If there are eight people who were discharged at a certain age, it seems to me that the jury could infer from that that there is a policy."

minations from January 1, 1974 to December 31, 1981.[6] These studies, which were done by a professor of statistics at Carnegie-Mellon University, showed no statistically significant variation in the age distribution of the workforce and, with one interesting exception, showed no statistically significant discrepancy in the terminations versus the population.[7]

At the conclusion of the trial, the District Court denied defendant's motion for a directed verdict, choosing instead to submit the matter to the jury.

The District Court instructed the jury that, if plaintiff established a prima facie case, defendant was required to "prove" that the plaintiff was discharged for reasons unrelated to the plaintiff's age. App. D at 4d. The District Court rejected defendant's proposed instructions that its burden was only to "articulate" a nondiscriminatory reason for the termination and that "the burden at all times is with the Plaintiff to affirmatively prove that he was terminated because of his age and to establish that by a preponderance of the evidence." The District Court instructed the jury that it could determine that defendant had a policy or practice of

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[6]

Age	*Under Age 40*		*Ages 40-49*		*Ages 50 and over*		*Totals*	
Distribution	*No.*	*Percent*	*No.*	*Percent*	*No.*	*Percent*	*No.*	*Percent*
All Terminations	202	51.3%	68	17.3%	124	31.5%	394	100%
Involuntary	83	49.1%	31	18.3%	55	32.5%	169	100%
Statistically Expected Involuntary	67.3	39.8%	47.5	28.1%	54.2	32.1%	169	100%

Defendant's Trial Exhibit "K".

[7]The only exception was a statistically significant higher number of *younger* terminations in the Retail Division of defendant. This is the same division in which all seven of the persons relied upon by plaintiff worked.

discrimination with respect to persons other than the plaintiff and could return a verdict in favor of the plaintiff if there was a logical connection between the policy or practice and the discharge of plaintiff.[8]

The jury returned a verdict in favor of plaintiff in the amount of $450,000.00.

Following the jury's verdict, the District Court denied plaintiff's request for reinstatement and ordered that a hearing be held concerning the amount of damages to be awarded plaintiff in lieu of reinstatement. Following the hearing, the District Court awarded an additional amount of $187,967.00 as "prospective damages" for a total award of $637,967.00. App. C. In spite of the District Court's explicit finding that the plaintiff "has failed to make reasonable efforts to mitigate damages," App. C at 3c, the District Court awarded damages based on plaintiff's loss of salary eight years into the future, until plaintiff's normal retirement date.

On appeal, the Court of Appeals for the Third Circuit affirmed, holding that the evidence concerning the seven other selected former employees was sufficient to establish a pattern or practice of discrimination, that the cases to the contrary "do not control the outcome of the instant case" (implying that these authorities to the contrary were class action suits), that the District Court did not commit reversible error in instructing the jury that the defendant must "prove" a nondiscriminatory reason for the termination, and that the District Court's award of prospective damages was discretionary with the District Court. App. A.

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[8]The District Court's instructions to the jury are found in Appendix D hereto.

REASONS FOR GRANTING THE WRIT

I. The Decision Of The Court Of Appeals That Plaintiff's Evidence Concerning A Selected Few Other Employees Was Sufficient To Establish A Pattern Or Practice Of Discrimination Conflicts With Decisions Of This Court.

Since this Court's landmark decision in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), a plaintiff in a discrimination case has been required to fulfill his or her initial burden by establishing some evidence from which a reasonable factfinder might infer that an impermissible factor such as race, sex, age, etc. could be present in the employment decision at issue. Although differing formulations of the evidence necessary to permit the *McDonnell Douglas* inference have emerged, the basic requirement is some evidence from which one can infer, if the employment decision remains unexplained, that it is more likely than not the result of discrimination. *Furnco Construction Corp. v. Waters*, 438 U.S. 567, 576 (1978).

Similarly, assuming a *prima facie* case is established, a plaintiff, to sustain his ultimate burden of proof, must present some evidence from which a reasonable factfinder could conclude that a discriminatory intent motivated his termination. *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 253, 256 (1981).

In this case plaintiff had no evidence concerning his own termination from which a reasonable factfinder might draw such an inference. He sought to fulfill his initial and ultimate burdens of proof by parading in front of the jury, over defendant's objection, five selected former employees of defendant to testify that they quit, retired or were terminated and that they were between the ages of 40 and 70. Similarly, plaintiff testified, again over defendant's objection, concerning two

other selected former employees—one who was terminated and one who quit. *No evidence was presented of any age-based motivation for these seven isolated incidents.* On the basis of this selected testimony, the trial court allowed the jury to infer the existence of a pattern or practice of age discrimination[9] and that plaintiff's termination was logically connected to the pattern or practice.[10]

Such an approach, approved in this case by the Third Circuit Court of Appeals, conflicts directly with decisions of this Court which have held consistently that a pattern or practice of discrimination must be proven by reference to a sufficiently large random sample population, *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 336, 339-40 n.20 (1977); *Mayor of Philadelphia v. Educational Equality League*, 415 U.S. 605, 611, 621 (1974), and that isolated discriminatory acts do not establish a pattern or practice of discrimination. *Cooper v. Federal Reserve Bank of Richmond*, 104 S.Ct. 2794, 2799-2800 (1984) ("Proving isolated or sporadic discriminatory acts by the employer is insufficient to establish a prima facie case of a pattern or practice of discrimination."); *see* B. Schlei & P. Grossman, *Employment Discrimination Law* at 1375-76 (2d ed. 1983). In this case plaintiff did not seek to create an inference of discrimination by offering evidence indicating that age was a factor in connection with the seven other terminations; plaintiff's evidence established only that the seven other persons

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[9] In the context of all of the terminations that occurred (*see* footnote 6, *supra*), the seven isolated incidents selected by plaintiff were not probative on the issue of whether he was discharged because of his age.

[10] All seven of plaintiff's selections had been middle- or lower-level employees of the Retail Division of defendant, a multi-divisional company of which plaintiff was Vice President, Treasurer and Chief Financial Officer. *Cf.* footnote 7, *supra*.

were in the protected age group and that their employment terminated.

To permit a plaintiff to prove a pattern of discrimination against older employees merely by parading before a jury a few former employees, chosen by him, would revolutionize the method of proof in discrimination cases. This "similar treatment" theory of liability has never been sanctioned by this Court and cannot permit an inference of discrimination unless it contains probative evidence of a defendant's discriminatory intent. The facts offered by the plaintiff and admitted into evidence by the trial court established nothing relevant to the question of defendant's discriminatory intent. Indeed, plaintiff made no attempt to establish any reference population or to compare the number of older to younger terminations. A reference population is essential to place such evidence in context. *Hazelwood School District v. United States*, 433 U.S. 299, 307-08 (1977); *see also Pace v. Southern Ry. System*, 701 F.2d 1383, 1389 (11th Cir. 1983), *cert. denied*, 464 U.S. 1018 (1983), *reh'g denied*, 465 U.S. 1054 (1984).

If the approach now approved by the Third Circuit is permitted to stand, the need for relevant comparative evidence would be undermined, as would many other evidentiary requirements in discrimination cases. No longer would the sample of persons studied need to be objectively selected. No longer would a sufficiently large sample need to be selected to be statistically significant. No longer would the focus in individual discrimination cases need to be on the individual plaintiff's termination. Rather, the focus could be on other terminations chosen by plaintiff and a series of "mini-trials" could occur on other allegedly discriminatory terminations.

Indeed, under this approach, virtually every employer could be found guilty of a pattern or practice of age discrimination if no proof of any age-based decision as to any person is required, no proper statistical evidence is necessary, and the court requires only evidence that selected other former employees resigned, were terminated or retired. This type of result is not consistent with this Court's prior decisions.

II. The Decision Below Conflicts With Decisions Of Other Courts Of Appeals Which Have Held That Testimony Concerning A Small Number Of Selected Other Terminated Employees Is Irrelevant And Prejudicial.

The decision below conflicts with the decisions of at least three other courts of appeals which have refused to permit evidence of a small number of other terminated employees to be the basis for one plaintiff's claim that he or she was the victim of unlawful discrimination. *Haskell v. Kaman Corp.*, 743 F.2d 113 (2d Cir. 1984); *Goff v. Continental Oil Co.*, 678 F.2d 593 (5th Cir. 1982); *Pace v. Southern Ry. System, supra.* In each of these decisions, an individual plaintiff attempted to prove a prima facie case or survive dispositive motions by pointing to a number of other employees who were allegedly subjected to discrimination. In each case, the court of appeals held, consistent with this Court's admonition in *Cooper v. Federal Reserve Bank of Richmond*, 104 S.Ct. 2794, 2799-800 (1984) (*see* page 8, *supra*), that a small number of other instances of discrimination is not sufficient to establish a pattern or practice of discrimination from which it can be inferred that the plaintiff was subject to discrimination.

Although these decisions were brought to the attention of the Third Circuit, it distinguished them on the basis that "[w]e are concerned here with an individual cause of action,

not a class action to establish a pattern or practice of discrimination." App. A at 3a. Upon examination, this distinction is without basis.

In the first place, there are no Rule 23 pattern or practice class actions under the ADEA as there are under Title VII.[11] Moreover, *Haskell*, *Goff*, and *Pace*, were, like the instant case, individual discrimination actions, not class actions. Thus, these cases cannot be dismissed for the reason suggested by the Third Circuit.

In *Haskell*, an individual terminated from employment sought to establish that he was terminated because of his age. As here, plaintiff introduced testimony of former employees concerning their terminations. As here, none of it was based on an objective evaluation of all terminations. Further, it represented such a small sample size as not to permit an inference of discrimination. *See* 743 F.2d at 121. In addition to holding that such evidence would not permit an inference of discrimination, the Second Circuit rejected this evidence on the basis that it "presented unnecessary collateral issues" and the probative value of the evidence was substantially outweighed by the danger of unfair prejudice. *Id.; see also Ste. Marie v. Eastern Railroad Ass'n*, 650 F.2d 395, 405-06 (2d Cir. 1981) (evidence of selected other incidents of alleged

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[11]Unlike the ADEA, Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, provides as explicit procedure for the litigation of "pattern or practice" cases. See Section 707(e) of Title VII, 42 U.S.C. § 2000e-6(e). Further, the enforcement provisions of the ADEA incorporate certain procedures of the Fair Labor Standards Act which require consent in writing before a lawsuit can be filed on behalf of a party. See Section 7(b) incorporating by reference Section 16(b) of the FLSA, 29 U.S.C. § 216(b). This incorporation of the Fair Labor Standards Act has been interpreted to preclude broadscale class actions under the ADEA. *See Lusardi v. Xerox Corp.*, 99 F.R.D. 89, 91-93 (D.N.J. 1983) (collecting cases), *appeal dismissed*, 747 F.2d 174 (3d Cir. 1984).

discrimination did not support inference of a pattern or practice of discrimination). The conflict between the Second Circuit's decision in *Haskell* and the Third Circuit's decision in the instant matter is direct and of critical importance to the adjudication of the rising number of ADEA actions.[12]

Similarly, in *Goff v. Continental Oil Co., supra*, the Fifth Circuit affirmed the exclusion of testimony by three former employees who were called to testify as to alleged racial discrimination against them. In addition to claiming that such evidence showed discriminatory intent, the plaintiff in *Goff* also argued that he wanted to establish a pattern or practice of discrimination which would tend to make his claim of individual discrimination more likely. Citing this Court's holding in *International Brotherhood of Teamsters v. United States, supra*, 431 U.S. at 336, that "more than the mere occurrence of isolated or 'accidental' or sporadic discriminatory acts" is necessary to establish a pattern or practice, the Fifth Circuit affirmed the exclusion of this evidence. 678 F.2d at 597.

In *Pace v. Southern Ry. System, supra*, summary judgment in favor of a defendant employer was affirmed where the plaintiff attempted to prove his case by a small number of other individuals similarly demoted. Because of the small number of other demotions and because the plaintiff failed to place these numbers in their relevant context, the Eleventh Circuit agreed that the plaintiff had failed to establish a prima facie case of age discrimination. 701 F.2d at 1388-89. *See also Goldstein v. Manhattan Industries*, 758 F.2d 1435, 1443-44

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[12]In recent years, the number of charges of age discrimination filed with the EEOC has risen dramatically. For example, in fiscal year 1983 over fiscal year 1982, there was a 66 percent increase in the number of charges filed and the percentage that age discrimination charges represented of the total changes rose from 17.00 percent to 22.37 percent. *See* 1982 and 1983 Annual Reports of the EEOC.

(11th Cir.) (evidence that four sales representatives other than plaintiff were replaced by younger persons was insufficient to establish prima facie case), *cert. denied*, 54 U.S.L.W. 3374 (1985).

Thus, the Third Circuit's decision in this case is in direct conflict not only with this Court's decisions under Title VII but it is in conflict with similar discrimination decisions by the Second, Fifth and Eleventh Circuits. Therefore, this case merits this Court's review. Moreover, the issue of whether a small select number of other events not caused by age can permit an inference of a pattern of age discrimination is of extreme importance in view of the dramatic rise in the number of age discrimination cases.

III. The Jury Instruction That The Defendant Must "Prove" That The Plaintiff Was Discharged For Reasons Other Than Age Directly Conflicts With The *Burdine* Decision Of This Court.

In *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981), this Court unanimously reversed the decision of the United States Court of Appeals for the Fifth Circuit which imposed upon the defendant the burden to prove a legitimate, nondiscriminatory reason for a termination. This Court specifically rejected the Fifth Circuit's articulation of the burden placed upon defendant because "it placed on the defendant the burden of persuading the court that it had convincing, objective reasons for preferring the chosen applicant above the plaintiff." *Id.* at 257 (footnote omitted). This Court explained that "[t]he Court of Appeals would require the defendant to introduce evidence which, in the absence of any evidence of pretext, would *persuade* the trier of fact that the employment action was lawful. This exceeds what properly can be demanded to satisfy a burden

of production." *Id.* (emphasis in original). This Court's decision in *Burdine* differentiates the burden of production from the burden of persuasion. *See* 450 U.S. at 255 n.8.

In this case, the District Court instructed the jury that, following the establishment of a prima facie case, the burden shifted to the defendant to "*prove* that the discharge was caused by reasons unrelated to Plaintiff's age." App. D at 4d (emphasis added).

This instruction is in direct conflict with this Court's decision in *Burdine*. Nevertheless, the Third Circuit approved this clearly erroneous instruction to the jury that the burden of proof was upon the defendant. It cited *United States v. Fischbach & Moore, Inc.*, 750 F.2d 1183, 1195 (3d Cir. 1984), *cert. denied*, 105 S.Ct. 1397 (1985), for the proposition that the jury charge must be taken as a whole and reversed only if it could have misled the jury. No greater potential for misleading a jury could be imagined than giving an instruction that the defendant must *prove* a legitimate, nondiscriminatory reason for the termination in question. No other correctly stated instructions can eliminate the potential for prejudice of such an erroneous instruction.

In *Burdine*, this Court held that the "defendant need *not* persuade the court that it was actually motivated by the proffered reasons." 450 U.S. at 254 (emphasis added). Yet, the approach approved by the Third Circuit would establish a rule for discrimination cases arising under the ADEA contrary to what this Court so painstakingly explained applies in discrimination cases under Title VII. Therefore, this decision merits review by this Court.

IV. The Decision Below Awarding Plaintiff "Prospective Damages In Lieu Of Reinstatement" For A Period Of Over Eight Years After Trial Conflicts With The Holdings Of Other Courts Of Appeals.

Relying on *Maxfield v. Sinclair International*, 766 F.2d 788 (3d Cir. 1985), which upheld an award of $7,500 for loss of "front pay," the Third Circuit in the present case affirmed the District Court's award of "prospective damages in lieu of reinstatement" in the amount of $187,967.00. The District Court's award was based on plaintiff's projected loss of salary and benefits through the year 1990, when he would have reached normal retirement age. The sanctioning of such an award by the Third Circuit conflicts with other decisions of Courts of Appeals and district courts and is contrary to the provisions and intent of the ADEA. If permitted to stand, the decision of the Third Circuit will have a far-reaching effect upon the amount of damages recoverable under the ADEA.

There exists a wide divergence of rulings by courts which have addressed the issue of damages under the ADEA for loss of future (*i.e.*, beyond the date of trial) pay. *See O'Donnell v. Georgia Osteopathic Hospital, Inc.*, 574 F. Supp. 214, 216 (N.D. Ga. 1982), *aff'd in part and reversed in part*, 748 F.2d 1543 (11th Cir. 1984) ("The federal courts have struggled considerably with this issue.").

In addition to the Third Circuit, the Second,[13] Sixth,[14] Eighth,[15] Ninth,[16] Tenth[17] and Eleventh[18] Circuits have ruled that future damages are recoverable under the ADEA. On the other hand, the First Circuit has denied recovery of such damages.[19] In addition, Chief Judge Seth of the Tenth Circuit has indicated that future damages should not be recoverable under the ADEA.[20]

Even among the courts that have allowed recovery of future damages, there is disagreement concerning the purpose for and, accordingly, the circumstances under which such an award may be appropriate and the permissible amount of such an award. In contrast to the present case, most awards of future damages have been in relatively small amounts and for relatively short periods of time. *See, e.g., E.E.O.C. v. Prudential Federal Savings and Loan Association, supra* ($17,000 in future benefits); *Maxfield v. Sinclair International, supra* ($7,500); *Hoffman v. Nissan Motor Corp.*, 511

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[13]*Whittlesley v. Union Carbide Corp.*, 742 F.2d 724, 727-29 (2d Cir. 1984).

[14]*Davis v. Combustion Engineering, Inc.*, 742 F.2d 916, 922-23 (6th Cir. 1984).

[15]*Gibson v. Mohawk Rubber Co.*, 695, F.2d 1093, 1100-01 (8th Cir. 1982).

[16]*Cancellier v. Federated Department Stores*, 672 F.2d 1312, 1319 (9th Cir.), *cert. denied*, 459 U.S. 859 (1982); *Naton v. Bank of California*, 649 F.2d 691, 700 (9th Cir. 1981).

[17]*E.E.O.C. v. Prudential Federal Savings and Loan Ass'n*, 763 F.2d 1166, 1171-73 (10th Cir.), *cert. denied*, 106 S.Ct. 312 (1985).

[18]*Goldstein v. Manhattan Industries, Inc.*, 758 F.2d 1435, 1448-49 (11th Cir. 1985); *O'Donnell v. Georgia Osteopathic Hospital, Inc.*, 748 F.2d 1543, 1551 (11th Cir. 1984).

[19]*Kolb v. Goldring Inc.*, 694 F.2d 869, 874 and n. 4 (1st Cir. 1982).

[20]*Blim v. Western Electric Co., Inc.*, 731 F.2d 1473, 1479 (10th Cir. 1984) (Seth, C. J., dissenting); *see Davis v. Combustion Engineering, Inc.*, 742 F.2d 916, 924 (6th Cir. 1984) (Wellford, J., dissenting) (damages awarded should have been limited to those accrued as of trial).

F. Supp. 352, 357 (D.N.H. 1981) ($20,000 to enable the plaintiff to start a new business); *see Loeb v. Textron, Inc.*, 600 F.2d 1003, 1023 (1st Cir. 1979) ("Assuming, without in any way deciding, that a monetary award may be made in lieu of reinstatement, we suspect that both continuing payments and substantial awards calculated, for example, on the basis of life expectancy would be inappropriate.").

The present case is an example of the difficulty the courts have had with the issue of the recoverability of future damages under the ADEA. The substantial award sanctioned by the Third Circuit goes far beyond "tiding over" the plaintiff while he seeks reemployment. Rather, the award was projected eight years into the future and was made to a plaintiff, who, as found by the District Court, "failed to make reasonable efforts to mitigate damages." App. C at 3c. No other reported decision has approved such an award under these or similar circumstances.

The Third Circuit's affirmance of the District Court's substantial award of "prospective damages" conflicts with other cases and is contrary to the provisions and intent of the ADEA. The decision, if followed, will have a profound effect upon the extent of relief available for asserted violations of the ADEA, especially when the allegedly aggrieved party is at the lower end of the protected age class and attempts to recover loss of pay he or she would have received ten or even twenty years into the future.

CONCLUSION

Since the decision below is in direct conflict with the decisions of this Court and of other Courts of Appeals on important and recurring issues arising in cases under the Age Discrimination in Employment Act, a writ of certiorari should issue to review the judgment and opinion of the Third Circuit.

Respectfully submitted,

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APPENDIX A

NOT FOR PUBLICATION

United States Court of Appeals

FOR THE THIRD CIRCUIT

No. 85-3070

SAMUEL G. GRECCO

vs.

SPANG AND COMPANY, a corporation

Spang & Company

Appellant

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA (PITTSBURGH)
(D.C. CIVIL NO. 79-0775)
DISTRICT JUDGE: HON. HUBERT I. TEITELBAUM

Argued
October 2, 1985

Before: HUNTER AND MANSMANN, Circuit Judges and
DUMBAULD, District Judge.*

(Filed , 1985)

MEMORANDUM OPINION OF THE COURT

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*Honorable Edward Dumbauld of the United States District Court for the Western District of Pennsylvania, sitting by designation.

MANSMANN, Circuit Judge.

This appeal from a jury verdict for plaintiff in an age discrimination claim presents several issues. These issues include whether the district court correctly found that the plaintiff's evidence presented a prima facie case of age discrimination, whether the jury verdict in the plaintiff's favor was supported by substantial evidence, whether the jury charge was reversible error, and whether supplemental damage awards were proper. Because we find that the district court did not err or abuse its discretion on these and the other issues presented on appeal, we affirm.

I.

Appellant Spang & Co. terminated Frank Grecco's employment as a vice president on October 18, 1978. Grecco sued Spank under the Age Discrimination in Employment Act, 29 U.S.C. §§ 621-634 (ADEA), alleging that he had been wrongfully terminated because of his age.

The jury found for Grecco and awarded him $450,000 damages. Grecco thereafter moved to be reinstated or to receive supplemental damages in lieu thereof. The district court denied reinstatement but awarded prospective damages of $187,967.00, and entered judgment for the total amount of $637,967.00. In the course of the litigation, the district court denied motions by appellant for a directed verdict, for summary judgment, for judgment notwithstanding the verdict, and for a new trial. Spang & Co. appeals.

II.

Appellant initially contends that plaintiff's evidence at trial of a "pattern" of discrimination was legally and factually insufficient to sustain the jury's verdict. Appellant argues that

the district court erred in denying its motions for summary judgment, for a directed verdict, and for a judgment notwithstanding the verdict. Appellant also contends that the trial court erred in admitting the testimony of a "pattern" of discrimination because it "was irrelevant and of no probative value."

With respect to the summary judgment decision, the district court issued a well-reasoned opinion denying the motion and explaining why the case should go to the jury. App. at 167-72. The district court held that, under the facts of this case, the plaintiff was not required to come forward with additional evidence attacking the defendant's proffered explanation for discharge. The court ruled that the plaintiff should have the opportunity to discredit the defendant's proffered reason at trial with his initial prima facie evidence and with effective cross-examination. App. at 172. We agree. *See also Texas Department of community Affairs v. Burdine*, 450 U.S. 248, 255-56 & n. 10 (1981).

We also find that appellee presented sufficient evidence to support the jury's verdict. With respect to the motions for a directed verdict and for judgment notwithstanding the verdict, appellant relies on a number of cases which address the measure of evidence necessary to establish a pattern or practice of discrimination in an ADEA action. These cases do not control the outcome of the instant case. We are concerned here with an individual cause of action, not a class action to establish a pattern or practice of discrimination. The two actions require different kinds of proof. *See Cooper v. Federal Reserve Bank of Richmond*, 52 U.S.L.W. 4853 (1984).

The instant plaintiff does not claim statistical proof of his discrimination claim. Instead, the plaintiff, after establishing a *McDonnell Douglas* prima facie case, uses the

testimony of fellow employees to add credibility to his discrimination claim and to support his allegations that a discriminatory motive more likely than not motivated his charge. *Accord Namenwirth v. Board of Regents of University of Wisconsin System*, 769 F.2d 1235, 1240-41 (7th Cir. 1985). Evidence of the defendant's alleged "youth movement" is relevant for that purpose.

In addition to Grecco's own testimony of discriminatory actions by Spang management and his eventual replacement by Frank Rath, Jr., a person in the unprotected age group, several other witnesses testified to terminations of retail division employees in the protected age group close in time to Grecco's, to systematic terminations of employees in the protected age group, to replacement of older employees by those not in the protected age group, and to statements by Frank Rath, Jr. that cumulatively are sufficient to create a reasonable inference of discriminatory motive in Grecco's termination. We find that the evidence produced at trial was sufficient to support the jury's verdict.

III.

Appellant next argues that it rebutted appellee's prima facie case and that "the jury could not reasonably have found that Spang had a policy or practice of age discrimination." Brief for Appellant, at 29. We recognize that the ultimate burden of persuasion remains at all times with the plaintiff. We find, however, that there was sufficient evidence from which the jury reasonably could find Spang's proffered reason was not credible or that Spang's action was more likely than not motivated by a discriminatory intent.

Appellant argues that the statistical evidence presented by its expert Dr. DeGroot refutes Grecco's prima facie case of

a pattern of age discrimination. On cross-examination, however, DeGroot admitted that his data was based on a judgment by Spang's General Counsel, William Marsh, as to which terminations were voluntary and which were involuntary. App. at 583. DeGroot conceded that the data could therefore be erroneous. App. at 584. He further stated on cross-examination that of the *total* number of terminations 36% occurred for employees age 40 or older and that this number was a large proportion of the terminations. App. at 586-87. The value of Marsh's testimony for rebuttal was therefore questionable.

In addition, the appellant contends that Frank Rath, Sr. presented evidence of many legitimate reasons for Grecco's termination and that this evidence was corroborated by company officers. Brief for Appellant, at 14-15. The testimony of the company officers, however, does not support any of Frank Rath Sr.'s statements other than the alleged insubordination at the October 12 and 13 meetings. The October 13 meeting was attended only by Rath and the Company officers, whom the jury apparently did not find credible, and by Grecco. Grecco's rebuttal evidence concentrated on the allegations of insubordination at the October 12 meeting. Grecco's witnesses who also attended that meeting, Warren M. Trigg and William Wallhausser, both denied that Grecco had been insubordinate at the meeting.

The only documentary evidence of Grecco's poor performance was the memo which apparently generated the dispute involved at the October 12 and 13 meetings and w' ich one witness, Raymond Curry, testified as intended "to be the final demise of Sam Grecco." App. at 347. This memo was apparently not introduced into evidence.

Spang argues that Grecco must specifically refute every purported legitimate reason asserted for Grecco's termination. No case has ever placed such a burden on the plaintiff. Instead, "the plaintiff's burden in showing that the proffered justification is merely a pretext 'merges with the ultimate burden of persuading the court that she has been the victim of intentional discrimination.'" *Lewis v. University of Pittsburgh*, 725 F.2d 910, 915 (3d Cir. 1983) (quoting *Burdine*, 450 U.S. at 256), *cert. denied*, 105 S.Ct. 266 (1984). We find the appellee's evidence in conjunction with the cross-examination of defense witnesses was sufficient to support the jury's conclusion that Spang's purported legitimate reasons for termination were pretext.

IV.

Appellant contends that the jury charge was reversible error in three respects.

First, appellant argues that the district court erred by failing to instruct the jury that plaintiff was required to prove that "but for" plaintiff's age, he would not have been terminated. The test for discrimination in an age discrimination suit is the "a determinate factor" test. *Duffy v. Wheeling Pittsburgh Steel Corp.*, 738 F.2d 1393, 1395 (3d Cir.) (citing *Smithers v. Bailar*, 629 F.2d 892 (3d Cir. 1980)), *cert. denied*, 105 S.Ct. 592 (1984). This court has instructed district courts which refer to "*the* determinate factor" test to explain that the plaintiff must "prove by a preponderance of the evidence that his age was the 'determining factor' in his discharge *in the sense that 'but for' his employer's motive to discriminate against him . . . he would not have been discharged.*" *Lewis*, 725 F.2d at 918 (emphasis and ellipsis in original) (quoting *Loeb v. Textron, Inc.*, 600 F.2d 1003, 1019 (1st Cir. 1979)).

In the instant case, the trial judge instructed the jury on the correct test: "a determinative factor." The district court also charged the jury that "[i]t is the Plaintiff's obligation of proving by a preponderance of the evidence that he was discharged because of his age." App. at 827. While the trial court did not use the words "but for", the court did use the statutory language "because of." *See* 29 U.S.C. §§ 623. That language is, of course, the basis for the "but for" test. *Cf. Loeb*, 600 F.2d at 1019 n. 25. Under the teachings of *United States v. Fischbach & Moore, Inc.*, 750 F.2d 1183, 1195 (3d Cir. 1984), *cert. denied*, 105 S.Ct. 1397 & 105 S.Ct. 1846 (1985), the charge must be taken as a whole and reversed only if it could have misled the jury. We hold that, despite the absence of the "but for" language, the charge in this appeal does not require reversal.

Second, the appellant contends that the trial court's jury charge on the respective burdens of the parties was error. The appellant contends that the court erred in telling the jury that the inference created when plaintiff establishes a prima facie case "dissolves if the employer could forthwith prove that the discharge was caused by reasons unrelated to the Plaintiff's age." App. at 827. The appellant also argues that the trial court failed to inform the jury that the burden of proof remains at all times with the plaintiff. Finally, the appellant asserts that "[t]he jury should have been instructed, as requested by defendant, that plaintiff had the burden to prove that the reasons articulated by defendant were nothing but pretexts to cover up discriminatory intent on its part." Brief of Appellant, at 41.

The trial judge did not commit reversible error in its jury charge on burdens of proof. The court conveyed to the jury the principle that the plaintiff bore the burden of proving the

ultimate issue—discrimination. The fact that the judge only outlined the *McDonnell Douglas* approach to establishing a prima facie case and shifting the burdens of production is not critical. "The word 'presumption' properly used refers only to a device for allocating the production burden." *Burdine*, 450 U.S. at 255 n.8 (citation omitted). "This evidentiary relationship between the presumption created by a prima facie case and the consequential burden of production placed on the defendant" is usually used to help "the judge determine whether the litigants have created an issue of fact to be decided by the jury." *Id.* Attention to the relative burdens of production should not obscure the ultimate question of discrimination which is for the jury to decide.

Likewise, it must be noted that the plaintiff's burden of proving "pretext" once a legitimate, non-discriminatory explanation has been proffered "merges with the ultimate burden of persuading the court that [he was] the victim of intentional discrimination." *Id.* at 256. The plaintiff may meet this burden "either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence." *Id.* (citation omitted). The trial court's charge was consistent with those principles. Consequently, the court's charge on the burden of proof was adequate under *Fischbach & Moore* and is not reversible error.

Finally, the appellant challenges the trial court's jury charge on liquidated damages. Section 7(b) of the ADEA, 29 U.S.C. § 626(b), provides for the award of liquidated damages "only in cases of willful violations." Appellant claims

that the district court's charge to the jury on liquidated damages was error because there is no evidence in the record of a willful violation of the ADEA.

The Supreme Court of the United States recently addressed the selection of a standard for "willful" violations under seciton 7(b). *Trans World Airlines, Inc. v. Thurston*, 53 U.S.L.W. 4024, 4028 (January 8, 1985). The Court held that an acceptable articulation of the standard is "that a violation is 'willful' if 'the employer either knew or showed reckless disregard for the matter of whether its conduct was prohibited by the ADEA.'" *Id.* The court rejected the "argument that a violation of the Act is 'willful' if the employee simply knew of the potential applicability of the ADEA." *Id.* The court reasoned that the section 7(b) standard used by the courts must not frustrate the intent of Congress to implement a two-tiered liability scheme. *Id.*

The trial court did not have the benefit of the *Trans World Airlines* opinion at the time of its charge to the jury. While the district court's charge that willful discrimination may be found where "the Defendant intentionally, knowingly or recklessly discriminated against the Plaintiff because of his age," App. at 829, does not coincide precisely with that approved by the Supreme Court, we find that the charge does promote a two-tiered liability scheme and is not reversible error.

The appellant's assertion that the record provides no support for a finding of willfulness does not merit extensive discussion. The record is not devoid of evidence which would support a finding that appellee "knew" or "showed reckless disregard for the matter of whether its conduct was prohibited by the ADEA."

V.

The appellant contends that the trial court improperly admitted an exhibit which portrayed actual appreciation in the price of restricted Spang stock for which Spang paid Grecco a formula price upon his termination in 1979. The appellant argues that because Grecco had invested the proceeds of that stock, allowing the jury to award the appreciation as damages provided a double recovery.

We reject the appellant's contention. The appellant was permitted to examine the appellee, and his testimony as to reinvestment of a portion of the proceeds was before the jury. App. at 407-11. Grecco would have enjoyed the appreciation of all of his Spang stock but for his termination. We hold, therefore, that permitting the jury to consider the appreciation was not error.

VI.

Appellant's final contention is that the district court improperly awarded damages, "front pay", in lieu of reinstatement. In light of this court's decision in *Maxfield v. Sinclair International*, 766 F.2d 788, 795-97 (3d Cir. 1985), we hold that the district court did not abuse its discretion in awarding appellee damages in lieu of reinstatement.

VII.

The judgment of the district court will be affirmed.

TO THE CLERK:

Please file the foregoing opinion.

/s/ CAROL LOS MANSMANN
Circuit Judge

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

SAMUEL GRECCO,
Plaintiff
v.
SPANG & COMPANY,
Defendant.

Civil Action No. 79-775

MEMORANDUM OPINION

I.

Plaintiff brought this action alleging that he had been discharged from his job by defendant on account of his age in violation of the Age Discrimination in Employment Act, 29 U.S.C. §§ 621-634. Trial of this action was held, at the conclusion of which the jury returned a verdict in favor of plaintiff and against the defendant. Judgment subsequently was entered on the jury's verdict and for an additional amount for prospective damags.

Presently before the court are motions by the defendant to have the verdict and judgment set aside and to have judgment entered in its favor or, alternatively, for a new trial. For reasons set forth below, both motions will be denied.

Defendant has raised a host of grounds in support of these motions. Many of those grounds already have been dealt with previously. Many others are meritless. Only those few grounds deserving a response and which have not been dealt with previously will be dealt with here.

II.

Defendant has presented the following grounds in support of its motion to have the verdict and judgment set aside and to have judgment entered in its favor

First, defendant contends that plaintiff failed to make out a prima facie case of age discrimination. Specifically, the defendant contends that plaintiff failed to show that he was replaced by someone outside the protected age group. According to defendant, plaintiff was replaced by Mr. Charles Dorsch, who was 47 years old and himself a member of the protected age group.

Evidence of the following often has been taken as sufficient to make out a prima facie case of age discrimination such as was alleged in this action: 1) that plaintiff was a member of the protected age group; 2) that he was qualified for the job; 3) that he was discharged; and 4) that he was replaced by someone from outside the protected age group. *See, e.g., Sills v. Fort Pitt Steel Casting Co.*, 24 FEP Cases 927 (W.D. Pa. 1979), *aff'd* 633 F.2d 211 (3d Cir. 1980)

However, the elements necessary to make out a prima facie case of age discrimination are not invariant but, rather, depend on the specific circumstances of the case. *See Duffy v. Wheeling-Pittsburgh Steel Corp.*, 738 F.2d 1393, 1395 n. 3 (3d Cir. 1984). All that is required for plaintiff to make out a prima facie case is that he present evidence from which an inference of age discrimination can be drawn. *See Whack v. Peabody*, 595 F.2d 190, 193 n. 3 (3d Cir. 1977).

Although there was evidence that plaintiff was replaced *immediately* by Charles Dorsch, there also was evidence that plaintiff *eventually* was replaced by Mr. Frank Rath, Jr., who

was outside of the protected age group. Frank Rath Jr. testified that eventually he assumed responsibility for all the tasks performed by plaintiff (Tr. 393, 441).

In light of the above, it cannot be said (as matter of law) that in order for plaintiff to have made out a prima facie case he must have shown that he was *immediately* replaced by someone from outside the protected age group. It might be enough for plaintiff to show that he was *eventually* replaced by such a person. Furthermore, it cannot be said that the above evidence presented at trial by Frank Rath, Jr. could not reasonably have given rise to the inference that plaintiff was discharged on account of his age.

Second, defendant contends that plaintiff also failed to produce evidence from which the jury reasonably could have found that defendant's articulated reason for discharging plaintiff was a pretext.

Once the plaintiff has made out a prima facie case and the defendant has articulated a nondiscriminatory reason for its action, the burden then falls upon the plaintiff to show that the proferred nondiscriminatory reason is pretext. The plaintiff may accomplish this either by persuading the finder of fact that a discriminatory reason more than likely motivated the employer or by showing that the proferred explanation lacks credence. *See Duffy v. Wheeling-Pittsburgh Steel Corp.*, 738 F.2d at 1396.

Plaintiff presented testimony from which the jury reasonably could have concluded both that a discriminatory reason more than likely motivated the defendant and that defendant's proferred explanation for its actions lacks credence.

Mr. Raymond Curry, Assistant to the Controller, testified that he worked under Claude Mueller, who was approximately 60 years old. Curry testified that he personally witnessed a long-standing harrassment of Mueller by Rath, Jr., who referred to Mueller as "an *old* fool". He further testified that other employees were referred to by Rath, Jr., as "*old* bastards", an "*old* hag", and that he referred to plaintiff as an "*old* son of a bitch."

Curry also testified that plaintiff, in his capacity as Vice President and Chief Financial Officer, often had to disagree with and correct ideas of Rath, Jr. concerning operation of the Spang Store Division.

Curry also testified about the creation of a Memo which led to a "confrontation" between plaintiff and Rath, Sr., and which was cited by defendant as a major reason for plaintiff's discharge. Curry testified that the Memo, which questioned certain accounting practices which had been in effect at Spang & Company for some time and which were known to everyone, including Rath, Sr., had been prepared at the direction of Rath, Jr. It was ordered that a copy of the Memo not be given to plaintiff, despite his corporate position. According to Curry, the Memo was orchestrated by Rath, Jr. and was intended as the "final demise of Sam Grecco".

III.

Defendant has presented the following grouds in support of its motion for a new trial.

First, defendant maintains that the final charge to the jury was erroneous in that the Court failed to state that plaintiff was required to prove that his age was a determining

factor, in the "but for" sense, in Spang's decision to terminate plaintiff. *See Lewis v. University of Pittsburgh,* 725 F.2d 910, 914-918 (3d Cir. 1983).

In order to recover under ADEA, plaintiff must prove that age was "a determinative factor" in the employer's decision. The plaintiff need not prove that age was the defendant's sole consideration, but need prove only that age "made a difference in the decision." *See Duffy v. Wheeling-Pittsburgh Steel Corp.,* 738 F.2d at 1395.

It is, of course, the substance rather than the form which determines whether a jury instruction is incorrect. *Lewis v. University of Pittsburgh,* 725 F.2d at 918. Moreover, the charge must be viewed as a whole. *Smithers v. Bailers,* 629 F.2d 892, 896 (3d Cir. 1980).

Although the jury charge did not make explicit use of the "but for" language, the substance of the "but for" requirement nonetheless was present. The charge reads in pertinent part as follows: "Fundamentally, the question is: was age a determinative factor in the decision of discharge? It is the plaintiff's obligation of proving by a preponderance of the evidence that he was discharged because of his age. He need not prove that his age was the sole factor leading to his discharge but, rather, that age was a determinate factor." (Tr. 786).

Second, defendant contends that the court improperly admitted evidence of the discharge of other Spang employees in aid of plaintiff's attempt to prove a pattern of age discrimination. Defendant contends that such evidence was irrelevant and prejudicial.

Evidence of a discriminatory pattern *may* give rise to an inference that individuals have been discriminated against

on account of their age. *See Franks v. Bowman Transportation Co.*, 424 U.S. 747, 772 (1976). A pattern of age discrimination cannot be made out by mere evidence of sporadic or isolated discriminatory acts. Rather, there must be evidence that such discrimination was standard operating preocedure, the regular instead of the occassional practice. *Cooper v. Federal Reserve Bank of Richmond*, ___ U.S. ___, 81 L.Ed.2d 718, 727-28 (1984).

Evidence is "relevant" if it tends to make the existence of any fact of consequence to the determination of the action more or less probable. Fed.R.Evid. 401.

Plaintiff produced five witnesses who had been employed within the Spang Store Division: Frank Adams, C. Melvin Eiben, Dominic Diulus, William C. Reffner, and Raymond Curry. Each of term testified as to various actions taken by the defendant. When viewed in its entirety, their testimony tended to make it more probable that defendant in fact discriminated, as a standard practice, against employees within the protected age group.

An appropriate order will issue.

Dated: January 8, 1985.

/s/ HUBERT I. TEITELBAUM

Hubert I. Teitelbaum
Chief United States District Judge

ORDER

AND NOW, January 8, 1985, IT IS HEREBY ORDERED that defendant's motion to have the verdict and judgment set aside and to have judgment entered in its favor is denied; and that defendant's motion for a new trial is denied.

/s/ HUBERT I. TEITELBAUM

Hubert I. Teitelbaum
Chief United States District Judge

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APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

SAMUEL GRECCO,

Plaintiff

v.

SPANG & COMPANY,

Defendant.

Civil Action No. 79-775

MEMORANDUM OPINION

I. Introduction.

Samuel Grecco, formery Vice-President, Treasurer, and Chief Financial Officer of Spang & Company, had been employed by Spang from May of 1959 until October of 1978, at which time he was involuntarily discharged. He was 53 years of age at the time of his discharge and presently is 58 years of age.

Grecco brought this action against Spang claiming that he had been discharged on account of his age in violation of the Age Discrimination in Employment Act (ADEA), 29 U.S.C. §§ 621-634. At trial, Grecco sought damages for loss of future salary and bonuses, stock bonus losses, and losses in value of stock called by Spang pursuant to a restrictive agreement. A jury awarded Grecco $450,000 in damages.

Grecco then filed a post-trial motion seeking reinstatement to his former job at Spang or prospective damages in lieu of reinstatement. This Court denied the motion for reinstatement and ruled that "front pay" was awardable in lieu of reinstatement under ADEA. A hearing then was held to

determine the amount of front pay, if any, to be awarded to Grecco.

II. Loss of Future Salary and Bonuses.

Grecco seeks $164,950 in damages for lost future salary and bonuses for the period July, 1983 to October, 1990, at which time he would reach 65 years of age and would retire.

29 U.S.C. § 626(b) provides that:

> . . . In any action brought to enforce this chapter the court shall have jurisdiction to grant such legal or equitable relief as may be appropriate to effectuate the purposes of this chapter, including without limitation judgments compelling employment, reinstatement or promotions or enforcing the liability for amounts deemed to be unpaid minimum wages or unpaid overtime compensation under this section.

The powers granted by § 626(b) are sufficient to authorize an award for lost future salary and bonuses in appropriate situations. *See Koyen v. Consolidated Edison Co. of N.Y.*, 560 F.Supp. 1160, 1168 (S.D. N.Y. 1983). The purpose of § 626(b) is to enable courts to make victims of age discrimination whole again for economic injury resulting from unlawful discrimination. *Rodriguez v. Taylor,* 569 F.2d 1231, 1238 (3d Cir. 1977), *cert. denied,* 436 U.S. 913 (1978). To hold that lost future salary and bonuses are not recoverable items of damages as a matter of law would nullify the "make whole" philosopy of those remedies available under ADEA.

An award for lost future salary and bonuses may be made, under certain circumstances, to cover the period of time up to normal retirement age. This too follows from the "make whole" objective of ADEA remedies. A court may presume, absent evidence to the contrary, that an illegally

discharged employee would have continued working for the employer until normal retirement age.[1] *See Gibson v. Mohawk Rubber Co.*, 695 F.2d 1093, 1101 n.8 (8th Cir. 1982).

A victim of age discrimination has a duty to mitigate damages by making reasonable efforts to obtain gainful employment in an available job market. *See EEOC v. Kallir, Phillips, and Ross, Inc.*, 420 F.Supp. 919, 925 (S.D. N.Y. 1976). Failure to mitigate is not, however, a complete bar to recovery. Rather, it requires a proportionate reduction in the victim's damages. *Vizzini v. Ford Motor Co.*, 569 F.2d 754, 766 (3d Cir. 1977).

In light of the circumstances of this case, Grecco is entitled to an award of damages for lost future salary and bonuses at Spang for the period covering July, 1983 to October, 1990.

Grecco has suffered economic injury as a result of being unlawfully discharged by Spang.[2] Also, the period of time in question is not so lengthy as to make an award for such damages too speculative.

However, Grecco has failed to make reasonable efforts to mitigate damages. Grecco found another job as Vice-President at International Staple and Machine Co. (ISM) in July, 1979, approximately nine months after being discharged at Spang. He then voluntarily resigned from ISM in January, 1980. Except for occasional stints as a consultant, Grecco has not found employment since that time. Although Grecco sent out his resume to various prospective employers

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[1]This presumes, of course, that the period of time in question is not so lengthy as to make such an award too speculative.

[2]See Part VI, below.

and employment agencies in January, 1979, he has not updated his resume since then. With one exception, Grecco has not sought work with any accounting firm since January, 1979, even though he is a certified public accountant. He made no effort to find such work in the twelve month period preceding December, 1983. Grecco was interviewed for a position at Mesta Machine Company but withdrew his application there on June 3, 1981. Finally, except for two contacts he had with an employment agency concerning a job with a bank, Grecco has had no contact with an employment agency within the twelve months preceding December, 1983.

Damages for lost future bonuses and salary have been determined in the following way. Grecco's projected salary and bonuses have been determined for each of the years between 1983 and 1990. From those totals certain amounts have been deducted. That portion of Grecco's salary and bonus included in the jury award on June 28, 1983 had been subtracted from the total for 1983. Also, the salary and bonus for each of the years from 1983 to 1990 that Grecco would have received from ISM had he not voluntarily resigned in January, 1980 have been subtracted from the above amounts.[3]

Because these damages pertain to future losses and because it is reasonable to assume that interest could safely be earned on the damages awarded, the total amount arrived at will be discounted to present value. *See Chesapeake & Ohio R. Co. v. Kelly*, 241 U.S. 485 (1916). Also, because no evidence of future price inflation was presented, it is necessary to choose a below-market discount rate. *See J & L Steel Corp. v. Pfeiffer*, 76 L.Ed. 2d 768, 790 (1983). A discount rate

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[3]No projected annual increases have been included in any of these amounts because no evidence as to such was presented.

of 3% per annum has been applied here. Finally, rather than averaging the annual installments and then calculating total present value on that basis, we will calculate the present value for *each* annual installment and add them together to determine the total present value. *See Pfeiffer*, 76 L.Ed. 2d at 783-784.

The Court, having made the following findings, concludes that an award of $82,645 will make Grecco whole for lost salary and bonuses during the period in question:

Loss of Salary and Bonuses

	1983	1984	1985	1986	1987	1988	1989	1990
Spang:								
Salary: $5,500/mo								
	$33,000	66,000	66,000	66,000	66,000	66,000	66,000	55,000
Bonus: 3 mos. salary								
	$ 0	8,325	16,500	16,500	16,500	16,500	16,500	0
	$ 33,00	74,325	82,500	82,500	82,500	82,500	82,500	55,000
ISM:								
Salary: $5,000/mo								
	$30,000	60,000	60,000	60,000	60,000	60,000	60,000	50,000
Bonus: $6,550/yr								
	3,000	6,550	6,550	6,550	6,550	6,550	6,550	0
	$33,000	66,550	66,550	66,550	66,550	66,550	66,550	50,000
Difference:								
	0	7,775	15,950	15,950	15,950	15,950	15,950	5,000
Present Value:								
	0	7,542	15,033	14,596	14,170	13,758	13,358	4,188

TOTAL: $82,645

III. Stock Bonus Losses.

Grecco seeks $182,505.40 in damages for stock bonus losses sustained between July, 1983 and October, 1990.

Stock bonus losses are recoverable as an element of prospective damages under ADEA. Those considerations dictating that Grecco be awarded damages for loss of future salary and bonuses also dictate that he be awarded damages for stock bonus losses, during that period of time. The stock bonus plan in which Grecco participated at Spang ultimately was based on is W-2 earnings at Spang.

Damages for stock bonus losses have been determined in the following way. Grecco's projected W-2 earnings for each of the years in question has been determined. Then the contribution to the stock bonus plan at 10% of W-2 earnings has been determined for each of the years in question. Finally, 56% of this last amount has been added to each year's total as the value of contributions to the stock bonus plan resulting from forfeitures by others employed by Spang, which contributions would have inured to Grecco's benefit as a result of terminations of other Spang employees during the period from 1983 to 1990.

Certain requested items have not been included in the award for stock bonus losses. Nothing has been awarded for lost dividends because such an award would be too speculative to be reasonably ascertained. *See First National Bank of Chicago v. Jefferson Mortgage Co.*, 576 F.2d 479, 494 (3d Cir. 1978). Also, nothing has been awarded for lost increases in formula price of stock because the price was set in the restrictive agreements and does not vary from year to year and was paid to Grecco when Spang repurchased its stock from him.

The Court, having made the following findings, concludes that an award of $81,840 will make Grecco whole for stock bonus losses during the period in question.

Stock Bonus Losses.

	1983	1984	1985	1986	1987	1988	1989	1990
Projected W-2 earnings:	$33,000	82,500	82,500	82,500	82,500	82,500	82,500	55,000
Stock Bonus Contributions at 10%:	$ 3,300	8,250	8,250	8,250	8,250	8,250	8,250	5,500
Forfeitures at 56%:	$ 1,848	4,620	4,620	4,620	4,620	4,620	4,620	3,080
TOTAL:	$ 5,148	12,870	12,870	12,870	12,870	12,870	12,870	8,580
Present Value:	$ 5,148	12,494	12,130	11,777	11,434	11,101	10,779	6,976

TOTAL: $81,840

IV. Loss in Value of Stock Called by Spang.

Grecco seeks $950,607 in damages for loss in value of stock called by Spang on February 19, 1979 pursuant to a restrictive agreement.

No damages will be awarded for this purported loss. Given the historically volatile nature of stocks, such damages, if there are any, are far too speculative to be calculated to October, 1990 with any reasonable degree of certainty.

V. Loss of Pension Benefits.

Finally, Grecco also seeks $355,569 in damages for loss of pension benefits resulting from his dismissal by Spang in 1978.

Lost pension benefits are recoverable as an element of damages for the same reasons that lost future salary and bonuses are recoverable under ADEA. Also, pension benefits are based on a formula involving years of service with Spang multiplied by a specified percentage of one's salary at retirement.

The amount of damages for loss of pension benefits has been determined as follows. What Grecco's average annual salary at Spang would have been as of his retirement has been determined. Next, the percentage of Grecco's average annual salary that would have constituted his annual pension (had he worked for Spang without interruption from May, 1979 until October, 1990) has been ascertained. That percentage then was multiplied by Grecco's average annual salary to determine the dollar amount of his total annual pension.

From this amount certain items have been deducted. That percentage of the above total annual pension covering the period of time up to the time of trial was deducted.[4] Also, the annual pension Grecco would have received (had he continued working with ISM until October, 1990) was determined and deducted from the above projected total annual pension from Spang. The difference between these annual pensions was extended over the period of time constituting Grecco's life expectancy as of October, 1990. Finally, the difference between these annual pensions was reduced to present value for each of the years over which such pensions would be paid out.

---

[4]Grecco here is seeking only prospective damages—i.e., damages covering only the period *subsequent* to trial. Any damages covering the period *prior* to trial are not awardable by the Court and therefore must be deducted from the total damages awarded for lost pension benefits.

The Court, having made the following findings, concludes that Grecco has suffered damages for loss of pension benefits in the amount of $23,482.

Annual Pension Benefits

	Spang	ISM
Average Annual Salary:	$66,000	$60,000
Percentage of Annual Salary Constituting Annual Pension:	47.25%	8.5%
Total Annual Salary:	$31,185	$ 5,100
Percentage of Total Pension for Period from July, 1983 to October, 1990:	24%	
Pro Rate Amount of Total Annual Pension for Period from July, 1983 to October, 1990:	$ 7,485	

Lost Annual Pension Benefits

Pro Rata Amount of Total Annual Spang Pension for Period from July, 1983 to October, 1990:	$7,485
Total Amount of Annual ISM Pension:	5,100
	$2,385/year

	Lost Annual Pension Benefits	Reduction to Present Value
1990	$ 405	$ 330
1991	2,385	1,883
1992	2,385	1,828
1993	2,385	1,775
1994	2,385	1,723
1995	2,385	1,673
1996	2,385	1,624
1997	2,385	1,577
1998	2,385	1,531
1999	2,385	1,486
2000	2,385	1,443
2001	2,385	1,401
2002	2,385	1,360
2003	2,385	1,321
2004	2,385	1,282
2005	2,385	1,245
		$23,482

VI. Economic Injury Sustained by Grecco

Spang contends that Grecco is economically better off since it fired him. Consequently, Spang claims Grecco has suffered no economic injury for which he can be compensated. See Defendant's Exhibit G, where Spang has attempted to show that Grecco is $27,000 a year better off since it fired him. This incredible conclusion is reached by including in Grecco's alternate sources of income such things as the interest that would accrue on the $450,000 jury award, and on the $385,000 Spang paid Grecco when it bought back its stock pursuant to a restrictive agreement.

The collateral source doctrine, or some modified version thereof, precludes setting off these amounts against what

Grecco would have earned at Spang had he not been fired. According to the collateral source doctrine, any economic benefit Grecco receives from a source other than Spang is not set against Spang's liability for damages resulting from its unlawful act. *See Craig v. Y & Y Snacks, Inc.*, 721 F.2d 77, 83 (3d Cir. 1983). The rationale for the rule is that a wrongdoer should not benefit through a setoff for economic gains coming to the injured party from a source other than the wrongdoer. See *Craig*, 721 F.2d at 83.

Spang clearly is not entitled to a setoff for any interest that would accrue on the $450,000 jury award. While the initial $450,000 would come from Spang, any interest accruing on that amount clearly does not come from Spang but, rather, from some other source. Spang also is not entitled to a setoff for any interest that would accrue on the $385,000 that Spang paid Grecco in 1979 when it bought back its stock pursuant to a restrictive agreement for the same reason.

VII. Conclusion

Based on the above findings of fact and conclusions of law, the Court finds that Grecco is entitled to an award of $187,967 in prospective damages as a result of being unlawfully discharged by Spang on account of his age.

An appropriate order will be issued.

Dated: June 8, 1984.

/s/ HUBERT I. TEITELBAUM

Hubert I. Teitelbaum
Chief United States District Judge

ORDER

AND NOW, June 8, 1984, in accordance with the foregoing memorandum opinion, IT IS HEREBY ORDERED that plaintiff's motion for an award of prospective damages in lieu of reinstatement is granted, and that plaintiff is awarded One Hundred Eighty-Seven Thousand Nine Hundred Sixty-Seven ($187,967) Dollars in prospective damages.

IT IS FURTHER ORDERED that judgment is entered for the plaintiff and against the defendant in the total amount of Six Hundred Thirty Seven Thousand Nine Hundred Sixty-Seven ($637,967) Dollars.

/s/ HUBERT I. TEITELBAUM

Hubert I. Teitelbaum
Chief United States District Judge

cc: James R. Duffey, Esq.
Stone, Duffy, Israel & Cook
1528 Frick Building
Pittsburgh, PA 15219
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Reed Smith Shaw & McClay
747 Union Trust Building
Pittsburgh, PA 15230

APPENDIX D

(In Open Court)

THE COURT: May I point out to all of you, ladies and gentlemen, that when you stand up every time I come into this room, it has nothing to do with me personally. It's respect for the judicial system of the United States and it has no personal significance.

You have now heard all of the evidence in this case and it is about time for you to perform your function, which is to decide the factual issues involved and reach a just verdict between the parties. This is also that portion of the case where it becomes my duty to charge you on the law which you will apply to the facts as you find them in this case.

You will consider the law as I gave it to you in the preliminary instructions and during the trial as well as the instructions I'm giving at this time.

At the outset, I want to repeat that I am absolutely neutral in this case, just as you are. Under the law, if I wanted to I could sum up the evidence and give my opinion about it. I'm not going to do that because I feel that that would infringe upon your responsibility to decide the facts in this case. I won't give you any opinion. And since I'm not going to do it directly, I'm not going to do it indirectly by making faces, raising my eyebrows, or giving you any other knid of signals. Furthermore, of course, you shouldn't be concerned with what view I might have of this case, if I have one, because that's for you, and you alone, to decide. You alone decide the issue of fact involved.

Now, there are certain fundamental principles which you must apply in arriving at your conclusion based upon the facts of the case. While I may, during the course of these

instructions, refer to the facts, I wish to caution you that you are the sole judges of the facts in this case and your judgment of those facts should not be influenced at all by the Court.

At times during the trial, I did ask certain questions. I did that because I felt that there were certain matters that had to be clarified for you to point up an issue. I had no intention to indicate any decision I had as to the facts or any opinion I had as to which side was right and which side was wrong as to the factual issues because those are matters for you.

You are, however, bound to follow the law in the case as I give it to you. You must not concern yourself with the wisdom of any rule of law stated by the Court. Regardless of any opinion you might have as to what the law ought to be, it would be a violation of your sworn duty to base a verdict upon any other view of the law than that given in the instructions of the Court. Just as it would be a violation of your sworn duty, as judges of the facts, to base a verdict on anything but the evidence in the case.

While you should not permit any invasion of your province to alone judge the facts you heard, the able arguments of these two fine attorneys are entitled to your respectful consideration. Their arguments should be of considerable aid to you in marshalling the facts in your mind, but you alone are the judges of those facts.

Now, I'm not going to review all the testimony in this case in any detail. You heard it and it is your duty to remember it. It has been argued to you vigorously. Take the law as I give it to you, and you determine from the testimony and from the exhibits what you believe the facts to be in this case. I will briefly summarize the contentions of the parties as I understand them. However, let me remind you that they

have each told you what their contentions are. Of course, they know better than I what they contend. If you think that my summary of the contentions is not what the parties contended, you take your decision as to that and not mine.

The Plaintiff contends that he was improperly discharged from his employment in violation of the Age Discrimination In Employment Act. The Defendant denies this is so and asserts that it discharged the Plaintiff for reasons unrelated to age. Those are the basic facts. Now, what is your basic problem? You have to decide why Mr. Grecco was terminated. You have to determine whether his age was a factor in his discharge. And if not, whether you like any other reason he was discharged or not is totally irrelevant. You shouldn't consider any other kind of discharge because that's not before us here.

I now want to instruct you as to the law which you must apply in deciding the issues presented in this case. This is an action, as I have said, under the Age Discrimination In Employment Act for an improper discharge. Fundamentally, the question is was age a determinative factor in the decision of discharge? It is the Plaintiff's obligation of proving by a preponderance of the evidence that he was discharged because of his age. He need not prove that his age was the sole factor leading to his discharge but, rather, that age was a determinate factor in such discharge.

Because of the difficulty in proving discrimination directly, it has been held that if a plaintiff establishes 1) that he was a member of a protected age group—and there's no doubt that Mr. Grecco was a member of a protected age group—that he was performing his job at a level that met his employer's legitimate expectations, that he was, nonetheless, discharged, and either that he was replaced by someone

outside the protected age group or there were other facts establishing that—proving that he was discharged because of his age, if so then an inference of discriminatory charge may be made. This inference dissolves if the employer could forthwith prove that the discharge was caused by reasons unrelated to the Plaintiff's age.

Similarly, an inference of discrimination may be drawn from proof of a policy or practice of discrimination with respect to other individuals. However, for this inference to be used to establish that the Plaintiff in this case was discriminated against, there must be a logical connection between the policy or practice alleged and the discharge of the Plaintiff in this case.

There is no automatic presumption that the termination of a person within the protected age group (for purposes of this case 40 to 65) violates the Age Discrimination In Employment Act. The employer has a right to discharge an employee for a good reason, a bad reason, or no reason at all so long as he does not do so because of age.

Should you find that the Plaintiff was the victim of discrimination, you will have to calculate what damages, if any, should be awarded. The fact that I give you these instructions on damages does not imply in any way that I think he was discriminated against. Instructions are given for your guidance and should only be considered in the event that you find in favor of the Plaintiff in accordance with the other instructions which I have given you. In other words, I have to instruct you on them. That doesn't mean that I think you should reach it or that I don't think so.

If you find he was discriminated against as I have charged you (discharged because of his age), then you would

have to get to the element of damages. If you don't, you would not. The purpose of money damages is to restore a victim of discrimination to the same economic position he would have occupied had he not been discriminated against. However, in assessing damages, you should be aware that a victim of discrimination must use reasonable efforts to seek other employment and thereby mitigate damages. Therefore, to correctly estimate damages, you should calculate the total compensation of all kinds that the Plaintiff would have received if he had remained with Spang & Company from the date of discharge down to the date of this trial. From this amount, you should subtract the amounts Plaintiff could have earned over the same period by exercising reasonable diligence. These amounts include such sums received as unemployment compensation, and Plaintiff concedes that also could include what he could have earned at International Staple & Machinery Company had he not quit.

You may also award an additional sum as liquidated damages if, and only if, you find that the Defendant Spang & Company wilfully discriminated against the Plaintiff. By wilful discrimination is meant that the Defendant intentionally, knowingly or recklessly discriminated against the Plaintiff because of his age. If you find this kind of discrimination, then you may award as liquidated damages a sum equal to what you previously found would restore the Plaintiff to the same economic position as if he had not been discriminated against.

Now, I told you originally, and I repeat to you, that sympathy or prejudice must not influence you in any way in your deliberations. Our system of law does not permit jurors to be governed by sympathy, prejudice or public opinion. The parties to this case, and the public, expect that you will

carefully and impartially consider all the evidence in the case, follow the law as stated by the Court, and reach a just verdict. The evidence which you are to consider is the testimony of the witnesses and the exhibits which have been received in evidence. The production of evidence is governed by certain rules. And from time to time, its been my duty to rule on objections by either of the attorneys to questions of the other attorney or to certain answers. You must not concern yourselves with the reasons for my rulings, nor should you in any way consider or hold it against the lawyer or his client because he made those objections. You'll recall that I told you that that is what they have to do. That's the way problems come before the Court for solution.

Arguments, statements and remarks of counsel are intended to help you in understanding the evidence and applying the law and they are entitled to great weight by you. But they are not evidence, and if there is no evidence to back up those statements they should be disregarded by you.

In your deliberation and in arriving at your verdict, you will bear in mind that in an action of this kind the Plaintiff has the burden of establishing his case by a preponderance of the evidence.

In considering this case, you must examine all of the material evidence in order to determine its relevancy and the true state of facts. You will weigh all of the evidence, reconcile, if possible, any that appears to be in conflict, and in weighing that evidence or in attempting to reconcile apparent conflicts you must use that same judgment, reason, common sense and general knowledge of men and affairs as you would in everyday life.

In speaking of the burden of proof, I have referred to the requirement of the preponderance of evidence. This is a term that I am sure that you will readily understand. It is defined as that evidence which, after a consideration of all the evidence, is, in the opinion of the jury, entitled to greater weight. Stated another way, the phrase preponderance of the evidence means that the evidence which points to a certain conclusion appears to the jury to be more credible and probable than the evidence to the contrary. It means such evidence as when weighed with that which opposes it has more convincing force and from which it results that the greater probability is in favor of the party upon whom the burden rests.

Now, in your consideration of this case, you must also take into account the credibility of witnesses. And you are the sole judges of that. Credibility means believability. You judge the credibility of a witness—you may judge it—by the manner in which he gives his testimony, his demeanor on the stand, the reasonableness or unreasonableness of his testimony, his means of knowledge as to any fact about which he testifies, his interest in the case, if any, the feelings which he may have for or against any of the parties, any contradictory statements or circumstances tending to shed light upon the truth or falsity of such testimony, and it is for you to say what weight you will give to the testimony of any and all witnesses.

Now, in this case you heard opinions expressed by people who qualified as experts. You are permitted to consider the opinions of other persons who have so qualified and are knowledgeable in their field. The witness who testified in this case had special knowledge on matters at issue in this trial. In evaluating the testimony of these witnesses—I think there was only one expert, was there not?

MR. HELWIG: Yes, sir.

THE COURT: There was only one, Dr. DeGroot. (continuing)—And in evaluating the testimony of that witness, it will be your duty to take into consideration his experience, qualification, education and training, his ability to observe or know of what he speaks, their interest or bias or prejudice in the case one way or another. In short, the witness' credibility and believability is solely for your determination.

You have to recognize, however, the difference between opinion evidence and factual evidence. An opinion creates no fact. It is what somebody thinks about something, and that thought may be accurate or totally inaccurate and, yet, represent the honest conviction of the person who expresses it. Because of this, opinion evidence is generally considered of a lesser grade than factual evidence and is not entitled to much weight against contrary positive testimony of actual facts. The basic difference between factual and opinion testimony is that in one the witness testifies to a fact and certifies that what he says is true; whereas, in the other he testifies that in his opinion that such a thing is true and certifies only to the integrity of his belief. He says he believes his opinion to be correct and he does not pretend that he cannot be mistaken.

You may reject in whole or in part the opinion of any witness you disbelieve. And that applies whether his testimony is contradicted or not.

Now, you know that there are two kinds of evidence; direct evidence and circumstantial evidence. In these days where court trials are rather popular on t.v., you've heard the lawyer stand up and say, "That's nothing but circumstantial evidence." Well, let's examine the fact of that. Perry Mason

used to say it all the time. He wasn't a very good lawyer, anyway. But I think you ought to know what those two terms mean. Direct evidence is evidence which directly demonstrates the existence of a fact. A witness testifies that he knows of the existence of a fact from his own knowledge because he heard it, he saw it, he smelled it, he felt it, or he tasted it. Circumstantial evidence is evidence of certain facts from which you may infer certain other facts that normally follow according to the common experiences of mankind.

Now, I have a little example that I like to give to demonstrate that. A person looks out his window and says to his or her spouse, on a nice, snowy day in January, "There was a rabbit in our backyard. I saw it." That's direct testimony. He says, "I know there was a rabbit there. I saw it." The next-door neighbor says to his or her spouse, "There was a rabbit in our backyard. I see rabbit tracks." That is circumstantial evidence. There are not ordinarily rabbit tracks without a rabbit.

Now, what's the value of the two kinds of evidence? Well, suppose the fellow who says he saw the rabbit has such bad eyesight that he can't tell the difference between a rabbit and a pony. His direct testimony might not be very good; might not have very great probative value. Suppose the fellow that saw the rabbit tracks is a great expert on wildlife. His testimony might be of far greater value.

All I can say to you on that is that either direct evidence alone or circumstantial evidence alone, or a combination of the two, is sufficient to support your verdict so long as it satisfies you by the fair preponderance of the evidence.

In weighing evidence, you consider quality and not quantity. By that I mean the testimony of one witness may be

so credible that it would outweigh the evidence given by several witnesses to the contrary. I can't tell you where the credibility of a witness or the believability of testimony lies. All I can say is that you'll exercise your good common sense and your experience in life in determining those questions.

You should analyze all the evidence and harmonize as much of it as you can. If there are conflicts in the evidence that cannot be resolved by harmonizing them, then you must determine which is factual and which is not.

You will recall the evidence. And, as I said, I am not going to review it except as briefly as I did. Those are matters for you and you alone to determine.

Now, the testimony of a witness may be discredited or impeached by showing that he previously made statements which were inconsistent with his present testimony. The earlier, contradictory statements are admissible only to inpeach the credibility of the witness and not to establish the truth of those statements. It is the province of the jury to determine the credibility as to any witness who has been impeached. If a witness is shown knowingly to have testified falsely concerning any material matter, you have a right to distrust such witness' testimony in other particulars and may reject all of the testimony of that witness or give it such credibility as you think it deserves. An act or omission is knowingly done if done voluntarily and intentionally and not because of mistake or accident or other innocent reason.

APPENDIX E

SPANG & COMPANY

BUTLER, PENNSYLVANIA 16001
TELEPHONE (412) 287-8781

October 19, 1978

Notice to All Divisions:

Effective immediately Mr. Charles R. Dorsch is appointed Treasurer of Spang & Company replacing Mr. Sam Grecco who is no longer associated with the company.

Mr. Dorsch has been Vice President of the Magnetics Division of Spang Industries prior to his currrent appointment.

/s/ FRANK E. RATH

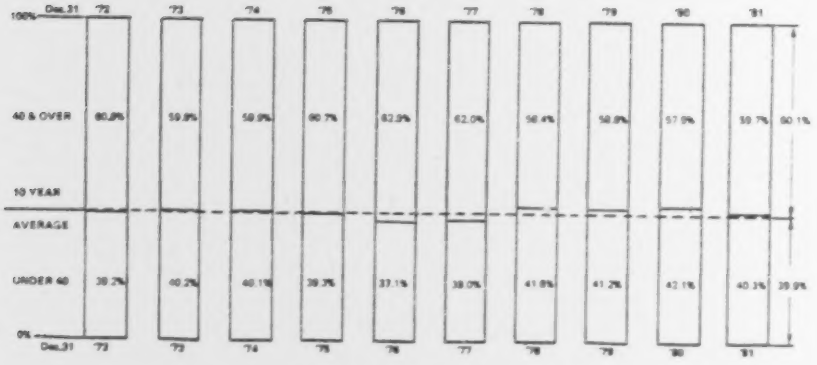
Frank R. Rath
Chairman

APPENDIX F

SPANG & COMPANY and SUBSIDIARIES

Exempt Salaried Employees by Age Category

DATE	TOTAL EMPLOYEES	UNDER AGE 40		AGE 40 AND OVER	
		NUMBER	PERCENT	NUMBER	PERCENT
12/31/72	339	133	39.2%	206	60.8%
12/31/73	343	138	40.2%	205	59.8%
12/31/74	336	136	40.1%	200	59.9%
12/31/75	328	129	39.3%	199	60.7%
12/31/76	329	122	37.1%	207	62.9%
12/31/77	329	125	38.0%	204	62.0%
12/31/78	320	133	41.6%	187	58.4%
12/31/79	262	108	41.2%	154	58.8%
12/31/80	259	109	42.1%	150	57.9%
12/31/81	243	98	40.3%	145	59.7%
Average for 10 years - 1972 through 1981			39.9%		60.1%



DEFENDANT'S EXHIBIT "D"

85-1173

IN THE

SUPREME COURT OF THE UNITED STATES

No. 1173, October Term, 1985

SPANG & COMPANY,

Petitioner,

v.

SAMUEL GRECCO,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

James R. Duffy, Esquire
1109 Grant Building
Pittsburgh, PA 15219
Counsel for Respondent, Samuel Grecco

COUNTERSTATEMENT OF THE QUESTIONS PRESENTED

1. May an individual age discrimination plaintiff prevail upon establishing, by competent evidence, a McDonnell Douglas prima facie case supported by evidence of age bias toward other employees directly related to, endorsed by, and participated in by the defendant's Chairman of the Board?

2. Under the Age Discrimination in Employment Act, is it proper to review the legal sufficiency and correctness of the charge as a whole rather than a portion taken out of context?

3. Is it the intent of the Age Discrimination in Employment Act that a wronged employee should be "made whole" so as to justify the award of prospective damages in those instances where, as a result of the defendant's discrimination, judicial discretion dictates that reinstatement is not appropriate and would not provide full or proper relief?

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Respondent, Samuel Grecco, respectfully prays that the Petitioner's petition for Writ of Certiorari be denied.

OPINIONS BELOW

The Post Trial Opinions of the District Court and the Circuit Court are appended to the Petitioner's Petition as Appendix A, Appendix B, and Appendix C.

JURISDICTION

Jurisdiction of this Honorable Court to receive the Defendant's Petition for a Writ of Certiorari is not contested.

STATUTE INVOLVED

The Statute involved is the Age Discrimination in Employment Act, 29 U.S.C. §621, et seq. Section 626(b) provides:

> In any action brought to enforce this Chapter, the court shall have jurisdiction to grant such legal or equitable relief as may be appropriate to effectuate the purposes of this chapter, including, without limitation judgments compelling employment, reinstatement or promotion, or enforcing the liability for amounts deemed to be unpaid minimum wages or overtime compensation under this section.

STATEMENT OF THE CASE

Samuel Grecco was 53 years of age on October 18, 1978. On and prior to that date, he was Vice President and Chief Financial Officer of Spang & Company.

Spang & Company is and was a diversified corporation with the majority of stock held by the Spang/Rath Family. Frank Rath, Sr. was, at all relevant times, the

Chairman and Chief Executive Officer of Spang & Company and made or concurred in all of the important decisions dealing with the corporation. Rath, Sr.'s son, Frank Rath, Jr., was second in command in the Spang Stores Division of Spang & Company.

Grecco was employed for 19 years with Spang & Company and grew into the position of Vice President and Treasurer, Chief Financial Officer and Member of the Board of Directors. In that position he had corporate administrative responsibility in the administrative, accounting, finance and data processing areas. Although Rath, Sr. appointed a nominal successor to Grecco, subsequent to Grecco's termination and prior to the time of trial, all of Grecco's major duties and responsibilities were being performed by Frank Rath, Jr. who became Vice Chairman and who was, at the time of trial, 35 years of age.

At trial, in his case in chief, the Plaintiff produced evidence that:

> (1) the management of Spang & Company consciously discriminated on the basis of age in the reassignment of pharmacists when Sun Drug Stores, a part of Spang Stores Division, went from two-man to one-man pharmacy operations,[1]
>
> (2) Frank Rath, Jr., with the concurrence of Frank Rath, Sr., engaged in an open course of conduct of harassment of older employees directly causing the termination or resignation of those older employees who were then replaced by younger employees,[2]
>
> (3) Frank Rath, Sr., the Chairman of the Board, and Frank Rath, Jr. openly vocalized their preference for younger employees,[3]

1. Testimony of Frank Adams.

2. Testimony of Adams, Eiben, Diulus, Reffner, Curry and Grecco.

3. Testimony of Curry and Grecco.

(4) Frank Rath, Jr. openly and publicly vocalized his disdain for older employees, including Grecco,[4]

(5) Frank Rath, Jr. embarked on a course of conduct, particularly the creation of a specious "Memo", which was patently intended to set up a basis for the Plaintiff's termination.[5]

(6) Prior to his termination, Grecco had received no complaints about his work; in fact had received a merit wage increase, and was given sensitive corporate assignments in the months immediately preceding his termination. Grecco was terminated with no warning, no explanation and no discussion of possible causes.[6]

In its case, Spang offered oral testimony in support of its alleged justifications for the plaintiff's termination. In addition, it offered a group of statistics developed by or under the direction of Spang's General Counsel. A Professor of Statistics testified as an expert.[7]

At the conclusion of the trial, the Plaintiff's case was submitted to the jury with instructions that "It is the Plaintiff's obligation of proving by a preponderance of the evidence that he was discharged because of his age." (App. D at 3. D), and that "In your deliberations and in arriving at your verdict, you will bear in mind that in an action of this kind the plaintiff has the burden of establishing his case by a preponderance of the evidence." (App. D at 6. D)

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4. Testimony of Curry.

5. Testimony of Curry. It should be noted that Curry did not claim that he was a victim of discrimination. He testified that he resigned at age 45 in protest to the blatant age discrimination which he was witnessing.

6. Testimony of Grecco.

7. The Statistical Expert acknowledged on cross examination that his data was based on subjective judgment material provided to him by Spang and that his conclusions could, therefore, be erroneous.

The jury returned a verdict in favor of the Plaintiff in the amount of $450,000.00.[8]

Subsequent to the jury's verdict, Grecco applied to the District Court for an Order of Reinstatement or, in the alternative, prospective damages in lieu thereof. After an extended hearing, the District Court awarded supplemental damages in the amount of $187,967.00.[9]

Spang applied to the Distrtict Court for a new trial or judgment N.O.V. which was denied. On appeal, the United States Court of Appeals for the Third Circuit affirmed the District Court.

REASONS FOR DENYING THE WRIT

I. A. The decision of the Court of Appeals affirming the District Court finding that Plaintiff's evidence was of such weight and sufficiency as to support the Plaintiff's verdict is consonant with the decisions of this Court and other Courts of Appeals on the subject. In addition, the decision below turns upon its own facts and will not affect other than the litigants.

Since it first filed its Motion for Summary Judgment many years ago, Spang has been urging that the evidence targeting the age bias of Frank Rath, Jr., known by and approved by the Chairman of Spang's Board, and the evidence of Rath, Jr.'s orchestration of the Plaintiff's termination was inadequate. Two Judges of the District Court have separately agreed on the weight and sufficiency of the Plaintiff's evidence.[10] The District Court's judgment has been thoroughly reviewed and affirmed by the Court of Appeals. Spang now asks this Honorable

8. Grecco had claimed past losses in excess of $600,000.00.

9. Grecco demonstrated future losses of salary, stock bonuses, and other emoluments in excess of One Million Dollars.

10. The Opinions of Judge Gustav Diamond denying Spang's Motions for Summary Judgment are reported at 527 F Supp. 978 (W.D. Pa. 1981) and 530 F.Supp. 782 (W.D. Pa. 1982).

Court to ignore its teaching in *United States v. Johnson*, 268 U.S. 220, 227 (1925) so as to grant certiorari to review evidence and to discuss specific facts.

In fact, the decision of the Third Circuit Court of Appeals in this case is fully in accord with the decisions of this Honorable Court. In *General Telephone Company of Southwest v. Falcon*, 457 U.S. 147 (1982) and *Cooper v. Federal Reserve Bank of Richmond*, 104 S.Ct. 2794 (1984), we were taught that there is a crucial difference between the proof required in an individual's claim of discrimination and the proof required in a class action alleging a general pattern or practice of discrimination. *International Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977) and *Mayor of Philadelphia v. Educational Equality League*, 415 U.S. 605 (1974) as well as *Cooper, supra* are cases dealing with class actions and each of them recognizes the distinction between the burden of an individual claimant and one holding himself out to represent a group.

The trial and proof of an individual age discrimination claim is not governed by a rigid or mechanistic formula.

> "As in any lawsuit, the plaintiff may prove his case by direct or circumstantial evidence. The trier of fact should consider all of the evidence giving it whatever weight or credence it derserves. . . . See *International Brotherhood of Teamsters v. United States*, 431 U.S. 324 at 358, Note 44."
>
> *U.S. Postal Service Board of Governors v. Aikens*, 103 S.Ct. 1478 (1983), Footnote 3.

I. B. The Decision of the Court Below is Consonant With the Decisions of Other Courts of Appeals.

The three cases cited by Spang to suggest conflict with other Circuits are readily distinguishable. The facts of *Haskell v. Kaman Corp.*, 743 F.2d 113 (2d Cir. 1984)

lacked the cohesive, binding testimony of Curry[11] whose testimony intimately related the terminations and discharges to Rath, Jr. and through him to Rath, Sr. That same weakness is obvious in *Goff v. Continental Oil Company*, 678 F.2d 593 (5th Cir. 1982). Additionally, the *Goff* court applied the class action language of *International Brotherhood of Teamsters, supra* and did not have the benefit of *U.S. Postal Service Board of Governors v. Aikens, supra*. *Pace v. Southern Railways System*, 701 F.2d 1383 (11th Cir. 1983) reviewed a Summary Judgment. Again, *Pace* lacked a Curry type cohesive witness. In addition, the Eleventh Circuit was reviewing the adequacy of a prima facie case rather than "the ultimate question of discrimination vel non". Cf *U.S. Postal Service Board of Governors, supra*, 103 S.Ct. at 1481, 1482.

I. C. The Decision of the Court Below Turns Upon the Facts of This Individual Case

The Circuit Court has issued a Memorandum Opinion not for publication which reflects the Court of Appeals further judgment that the written opinion will have no precedential or institutional value, and that the importance of the questions raised are confined to the parties involved.[12] Certiorari should not be granted to review weight and sufficiency of evidence and facts in such a case. *United States v. Johnson, supra*.

II. THE COURT'S CHARGE, READ AS A WHOLE, CORRECTLY INSTRUCTED THE JURY ON ITS RESPONSIBILITIES IN DETERMINING THIS INDIVIDUAL DISCRIMINATION CLAIM.

In two separate instances, the trial court informed the jury that it was the plaintiff's obligation to prove by a preponderance of the evidence that he was discharged because of his age. Thus, the plaintiff's burden on the

11. See Footnote No. 5.

12. Internal Operating Procedures for the United States Court of Appeals for the Third Circuit. V. A. 2.

ultimate question of discrimination "vel non" was clearly explained to the jury. The trial court's discussion of the shifting burdens of production under the McDonnell-Douglas approach is of no relevance to the ultimate burden explained to the jury.

The Court of Appeals correctly read the teaching of *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981) to apply only to the determination of "whether the litigants have created an issue of fact to be decided by the jury." (App. A at 8. A) Thus, the Court of Appeals followed the teaching of *U.S. Postal Service Board of Governors, supra* that after the finding of a prima facie case, "the McDonnell-Burdine presumption 'drops from the case' . . . and the factual inquiry proceeds to a new level of specificity". 103 S.Ct. at 1481, 1482.

Having moved to that "new level of specificity", the jury was correctly instructed on two occasions of the plaintiff's ultimate burden.

III. THE AWARD OF PROSPECTIVE DAMAGES PROVIDES THE FULL AND PROPER RELIEF CONTEMPLATED BY THE AGE DISCRIMINATION IN EMPLOYMENT ACT IN THOSE CASES WHERE REINSTATEMENT WOULD NOT BE IN THE BEST INTEREST OF THE PARTIES

When Congress enacted the Age Discrimination in Employment Act, it provided, in addition to the remedies taken from the Fair Labor Standards Act, that ". . . the court shall have jurisdiction to grant such legal or equitable relief as may be appropriate to effectuate the purposes of this chapter, including, without limitation judgments compelling employment, reinstatement or promotion . . ." 29 U.S.C. §626(b).

This broad grant of equitable powers cannot be ignored. It is obvious that Congress intended that an age discrimination plaintiff should be "made whole"; that is,

restored to the economic position he would have occupied but for the unlawful conduct of the employer. Cf *Maxfield v. Sinclair International*, 766 F.2d 788 (3d Cir. 1985).

The overwhelming majority of the Circuits which have considered the question have found prospective damages to be proper. See cases cited on Page 16 of Petitioner's Brief and *Maxfield*, *supra* at 796.

The Federal Courts have found no problem in projecting future damages in death, permanent and partial disability and other serious injury cases. There is no reason to assume that the federal judicial system becomes less competent when projecting damages in order to make a victim of discrimination whole.

CONCLUSION

The decision below, while it involves questions of importance only to the parties involved, is consonant with the decisions of this Court and the other Courts of Appeals on the issues raised. The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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